# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1966**

## No. 480

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WARDEN OF THE MARYLAND PENITENTIARY,

*Petitioner,*

*vs.*

BENNIE JOE HAYDEN,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## BRIEF FOR RESPONDENT

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## BRIEF FOR RESPONDENT

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### Opinions Below

The Opinions of the United States Court of Appeals for the Fourth Circuit (R. 131-151) are reported at 363 F.2d 647, sub nom. *Hayden* v. *Warden, Maryland Penitentiary.*

The Opinion of the United States District Court for the District of Maryland (R. 37-45) is unreported.

## Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 21, 1966 (R. 151). A Petition for Rehearing en banc was timely filed, and on June 3, 1966, the United States Court of Appeals for the Fourth Circuit filed an Order denying the Petition for Rehearing (R. 152). A judgment in lieu of mandate was issued to the United States District Court for the District of Maryland on June 13, 1966, and upon a Motion to Recall the Mandate, the judgment in lieu of mandate was recalled on July 13, 1966, pending the filing of a Petition for a Writ of Certiorari. The Petition for Writ of Certiorari was filed on August 25, 1966, and was granted on November 7, 1966 (R. 153). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

## Questions Presented

1. Whether this Court should, as an incident to a lawful arrest, sanction the ransacking of all three floors of a home in a general exploratory search for evidence?

2. Whether this Court should permit the seizure of items of evidential value only unearthed during an intensive exploratory search?

3. Whether failure by respondent's trial counsel to object to the admission into evidence of the items seized during the search of respondent's home forfeited his right to assert his constitutional claims before this Court?

## Statutes Involved

Amendment IV to the Constitution of the United States:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Rule 41 (b) of the Federal Rules of Criminal Procedure, and Rules 522 d 2 and 885 of the Maryland Rules of Procedure are set forth in Respondent's Appendix, *infra*.

## Statement

On March 17, 1962, at approximately 8:00 A.M., Charles E. McGuirk was assaulted and robbed of $363 on the premises of the Diamond Cab Company in Baltimore (R. 93). Two cab drivers, alerted by shouts of "Holdup", saw a man running from the scene of robbery (R. 97, 102). Proceeding independently, they followed this man to Cocoa Lane (R. 98, 99, 103). One of the cab drivers, giving chase in his cab, testified that he saw this man enter 2111 Cocoa Lane and relayed this information, along with a description of the man, to his Diamond Cab dispatcher by radio (R. 49). He described the man as a Negro; about 5 foot 8, twenty-five years, wearing a light hat and dark jacket (R. 49, 132).

This information, in turn, was relayed to several Baltimore police patrol cars which, within minutes, converged at the above address, a two-story row house (R. 49, 50, 55, 106). The police surrounded the house and began banging on all three doors of the house (R. 118).

The respondent's wife was awakened by this tumult and was frightened (R. 118). She went downstairs in her nightgown and robe and opened the front door (R. 63, 118). She was confronted by four or five police officers, one of whom asked if a holdup man had just run into her house (R. 63, 118). She testified that her only response was "No," but that the police just shoved past her and, without her permission, began to search all three floors of the house (R. 64, 106, 118). The original four or five officers who had rushed in the front door were immediately joined in the search by other officers who came in through the back door (R. 118). The officers who proceeded to the

second floor found the respondent in one of the bedrooms dressed in white shorts and a T-shirt, and apparently asleep (R. 52, 53, 106). While these officers questioned the respondent the search of the basement and first floor continued (R. 56, 106). Finding no other male in the house, the officers arrested the respondent (R. 106) and continued the search (R. 59-61, 106). While the search of the three floors progressed, the arresting officers questioned the respondent, his wife and his five- and four-year-old children as to the respondent's whereabouts prior to their entry (R. 119).

The scope and intensity of the search both prior to and after the respondent's arrest were described by one of the arresting officers in this manner:

> Q. Were you looking for money?
>
> A. *Whatever we would find.*
>
> * * * * *
>
> Q. That is right. Did you look in his pants?
>
> A. *We looked everywhere.*
>
> Q. And you found no money?
>
> A. That is right.
>
> Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?
>
> * * * * *
>
> A. Maybe five or six.
>
> Q. Yes. And they searched the house from top to bottom, didn't they?
>
> A. *Which is customary when you receive a call like that.* (Emphasis added) (R. 111-112).

The search covered all three floors of the respondent's home (R. 106). It involved the search of closets, bureau drawers, clothing, bedding—in short, the police looked "everywhere" (R. 64, 69, 112). Following the arrest and removal of the respondent from his home to the police station, the officers returned to 2111 Cocoa Lane and resumed their search (R. 65, 120). When asked what right they had to ransack her home without a search warrant, the respondent's wife testified that the police told her to shut up or she would be locked up (R. 65, 120).

The ransacking of the respondent's home yielded a harvest commensurate with its intensity. Prior to the arrest, a man's uniform, consisting of a waist-length jacket and matching trousers, with a leather belt in place, was found in the washing machine in the basement and seized (R. 56, 57). Following the arrest, an L. C. Smith shotgun and a P. 38 pistol were found in the toilet bowl tank in the second floor bathroom (R. 107). A loaded clip of P. 38 ammunition was found under the respondent's mattress and several 12 gauge shotgun shells were found in a bureau drawer (R. 107, 108). A man's grey cap and brown sweater were found under the respondent's mattress and were seized (R. 109).

All of these items were introduced into evidence against respondent at trial (R. 107-110). No objection was made by the respondent's trial counsel to the admission of these items into evidence because, as trial counsel testified at the habeas corpus hearing, he did not see any legal objection to their admissibility (R. 89, 90). The respondent was convicted of robbery and sentenced to a term of fourteen years in the Maryland Penitentiary (R. 41).

The respondent filed a Petition for Relief under the Maryland Post Conviction Procedure Act, which was denied without the taking of testimony on May 24, 1963 (R. 23-25, 41, 133). On Application for Leave to Appeal from this action, the Maryland Court of Appeals remanded the case for an evidentiary hearing. *Hayden* v. *Warden*, 233 Md. 613, 195 A.2d 692 (1963).

Following the hearing, on March 19, 1964, Judge Sodaro filed an order denying relief (R. 42), concluding that the arrest, search and seizure were proper (R. 43).

The respondent then filed an Application for Leave to Appeal to the Court of Appeals of Maryland, but before the Application could be acted upon, he requested to withdraw the Application and his request was granted (R. 36, 37).

On July 22, 1964, the respondent filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland (R. 8). Following an evidentiary hearing, Judge Thomsen found the arrest, search and seizure to have been proper and denied relief (R. 43-45).

On Appeal to the United States Court of Appeals for the Fourth Circuit, the Order of the District Court denying relief was reversed (R. 131-144). The majority found the search to have been proper under the authority of *Harris* v. *United States*, 331 U.S. 145 (1947), but held that the items of *clothing* introduced into evidence against the respondent at trial were not properly seizable. The majority cited the decisions of the Supreme Court holding that items having only evidential value are not the subject of seizure and must be excluded at trial and stated that this proscription is clearly one of constitutional dimensions

under the Fourth Amendment (R. 138). A petition for a rehearing en banc was denied (R. 152).

The State of Maryland filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Petition for Writ of Certiorari was granted on November 7, 1966 (R. 153).

## Summary of Argument

Respondent first argues that the search of his home was illegal in its entirety. In a number of essential elements the search goes further than the extremely permissive limits set out in *Harris* v. *United States*, 331 U.S. 145 (1947). The *Harris* case itself has been subject to a good deal of criticism and abuse, and respondent therefore earnestly contends that this case presents the ideal vehicle for a much needed re-examination and clarification of the *Harris* doctrine.

Pointing out that the mere evidence rule will be the last remaining protection against exploratory searches for evidence if the Court approves the search made here in the name of *Harris*, respondent argues alternatively that in the circumstances of this case the Rule should be applied and the items of evidential value only seized during the ransacking of respondent's home should therefore not be admissible against him.

Failure by respondent's trial counsel to object to the admission into evidence of the items seized during the search of respondent's home has not forfeited his right to assert his constitutional rights in this federal habeas corpus action for two reasons. First, it is apparent from the rec-

ord that trial counsel simply did not know there were any grounds for objection (R. 89, 90). There was not, therefore, any tactical or strategic decision on his part not to object. Secondly, as the court below pointed out (R. 135), the State of Maryland did not interpose the failure to object as a bar to consideration of the merits of the constitutional issue. It would therefore be incongruous for a federal court to assert the state ground to shut off its review of the federal question.

## ARGUMENT

### I.

### This Court Should Not Sanction as an Incident to a Lawful Arrest the Ransacking of All Three Floors of the Respondent's Home in a General Exploratory Search for Evidence.

A. *Harris v. United States, 331 U.S. 145 (1947), is the most permissive search and seizure case in the history of this Court. The present case significantly exceeds its limitations.*

This Court has decided many cases dealing with the extent to which police may search a home without a search warrant but incident to a legal arrest. *E.g., Ker* v. *California,* 374 U.S. 23, 40 (1963); *Abel* v. *United States,* 362 U.S. 217, 236 (1960). Clearly the most intense and wide-ranging search which has been upheld in such a context occurred in *Harris* v. *United States,* 331 U.S. 145 (1947). There, five policemen searched four rooms for five hours looking for two stolen checks which had been used in a fraudulent scheme. The decision sanctioning this search was rendered

by a Court split five-to-four, and has been controversial since the day it was handed down. Many commentators, as well as the four Justice minority, have been alarmed at the extent to which it authorizes warrantless searches. *E.g.*, Broeder, *Wong Sun: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 498-9 (1963); Carden, *Federal Power to Seize and Search Without a Warrant*, 18 Vand. L. Rev. 1, 11-12 (1966); Kaplan, *Search and Seizure, A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474, 490-92 (1961); LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. Ill. L. F. 255.

In order to uphold the search which occurred in the present case, the Court will have to go considerably beyond the limitations stated in the *Harris* opinion.[1]

The *Harris* majority bottomed its opinion on the fact that the record showed clearly and unambiguously that the arresting officers were searching for very specific items, small in size, which could have been secreted anywhere in the defendant's apartment. At the outset of the opinion the Court stated at 331 U.S. 148, 149:

> . . . The agents stated that the object of the search was to find two $10,000.00 canceled checks of the Mudge Oil Company which had been stolen from that company's office and which were thought to have been used in effecting the forgery. There was evidence connecting

[1] Without waiving respondent's *pro se* contention that his arrest was illegal, counsel for respondent has briefed the case on the assumption that this Court will find the arrest based on probable cause and therefore legal. Counsel for respondent asks this court to consider all of respondent's contentions which are set forth at p. 14 of the Record on their merits. Counsel has briefed only those contentions which in his professional judgment are worthy of serious consideration by this Court.

petitioner with that theft. In addition, the search was said to be for the purpose of locating "any means that might have been used to commit these two crimes, such as burglar tools, pens, or anything that could be used in a confidence game of this type."[8] . . . .

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[8] The agents who testified in the proceedings in the trial court clearly stated that the objects of the search was the means employed in committing the crimes charged in the warrants of arrest. None of the subsequent statements of the agents, if read in their context, are in conflict with that assertion.

Throughout the opinion the Court returns again and again to this fundamental premise, justifying the intensity of the search by the uncontradicted purpose of the officers to seize these small items.

. . . The canceled checks and other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. Other situations may arise in which *the nature and size* of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive.

. . . The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that the search in this case went beyond that which the situation reasonably demanded.

. . . Nor is this a case in which law-enforcement officers have entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of con-

> ducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime. *Go-Bart Company* v. *United States, supra; United States* v. *Lefkowitz, supra.* In the present case the agents were in possession of facts indicating petitioner's probable guilt of the crimes for which the warrants of arrest were issued. The search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged had been committed, particularly the two canceled checks of the Mudge Oil Company. The Circuit Court of Appeals found and the District Court acted on the assumption that the agents conducted their search *in good faith* for the purpose of discovering the objects specified. That determination is supported by the record. The two canceled checks were stolen from the offices of the Mudge Oil Company. There was evidence connecting petitioner with that theft. The search which followed the arrest was appropriate for the discovery of such objects. Nothing in the agents' conduct was inconsistent with their declared purpose. 331 U.S. 152, 153. (Emphasis added.)

Further amplifying this crucial point, Justice Minton in *United States* v. *Rabinowitz,* 339 U.S. 56 (1950), distinguished the searches in *Harris* and *Rabinowitz* from those held illegal in *Go-Bart Importing Company* v. *United States,* 282 U.S. 344 (1931), and *United States* v. *Lefkowitz,* 285 U.S. 452 (1932), by stating:

> In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here.

This "mark" of specificity imprinted upon the searches in both *Harris* and *Rabinowitz* is in fact the essence of principles followed by this Court in limiting the permissible boundaries of searches incident to arrest. These are:

1. That no search is reasonable which is conducted merely to obtain the evidence of a crime; hence general or exploratory searches aimed only at the uncovering of evidence which may aid in convicting are unreasonable.

2. That the justification for the initiation of a search will be determined upon the basis of facts known prior to the search.

If specificity as to objects sought is the "mark" of the permissible searches in *Harris* and *Rabinowitz,* while searches for "whatever might be turned up" is the "mark" of the illegal searches in *Go-Bart* and *Lefkowitz,* what then is the "mark" of the search presented in the case of Bennie Joe Hayden? When asked what objects were sought in the search of the respondent's home, Officer Duerr testified with remarkable candor as follows:

Q. Were you looking for money?
A. *Whatever we would find.*

* * * * *

Q. That is right. Did you look in his pants?
A. *We looked everywhere.*
Q. And you found no money?
A. That is right.
Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?
A. I wouldn't say ten or twelve, no, sir.

Q. How many?

A. Maybe five or six.

Q. Yes. And they searched the house from top to bottom, didn't they?

A. *Which is customary when you receive a call like that*[2] (R. 112). (Emphasis added.) (Testimony of Officer Duerr at the original trial.)

The method of the search and the items seized confirm its express exploratory nature. At least five police officers and perhaps as many as ten or eleven stormed past respondent's wife, who had fearfully come down from the bedroom in response to the banging at her door (R. 118). Some of the officers came in through the back door (R. 118). They fanned out through the house, searching the basement, the main floor and the upstairs bedrooms contemporaneously (R. 106). Although the legitimate purpose of the search was to locate and arrest a colored assailant, a washing machine in the house was searched and a uniform jacket and trousers seized before it was established that a Negro male was even on the premises (R. 56). Bureau drawers and clothing were searched before it was established that respondent was the only Negro male on the premises (R. 69). It is submitted that when the police entered 2111 Cocoa Lane their purpose was not merely to search for and arrest a robbery suspect but to search for and seize "anything" that might prove to be evidence of

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[2] For startling corroboration of this gratuitous revelation, see *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966). The callous disregard of the Fourth Amendment protection demonstrated by the Baltimore Police in this case was termed by Judge Sobeloff as "the most flagrant invasion(s) of privacy ever to come under the scrutiny of a federal court!" 364 F.2d at 201.

a crime as well. Following the arrest of the respondent, the purpose of their search was to seize "anything" that might link the respondent to the robbery, or to any other crime for that matter, thereby insuring his conviction. Curiously, the brown sweater found under the respondent's mattress has never yet been connected with the crime. It too was seized and admitted into evidence, however.

Aside from the lack of specificity of items searched for, "the total atmosphere" of the present case, *United States* v. *Rabinowitz*, 339 U.S. 56, 66 (1950), differs markedly from *Harris* in the following ways:

(1) Officer Duerr testified that the conduct of the search of the respondent's home from "top to bottom" was "customary when you receive a call like that"—(R. 112). The "customary" search procedures of the Baltimore Police are graphically revealed in the case of *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966). This class action, brought against the Police Commissioner of Baltimore on behalf of the Negro families of Baltimore, immediately resulted from a series of 300 searches conducted by the Baltimore Police during the period December 24, 1964, to January 12, 1965. In the words of Judge Sobeloff, "This case reveals a series of the most flagrant invasions of privacy ever to come under the scrutiny of a federal court." 364 F.2d at 201. Although these events occurred some eighteen months after the search of the respondent's home, the court noted at 364 F.2d 201 that:

> The undisputed testimony indicates that the police conducting the wholesale . . . raids were engaging in a practice which on a similar scale has routinely attended the efforts to apprehend persons accused of crime.

In considering the "total atmosphere" of the Hayden search, it is submitted that this Court should take into account the effect of such customary practices, conceived and authorized by high-ranking officials of the Baltimore Police Department, on the individual officers' respect for the Fourth Amendment. Against this background the seizure of evidential items without a warrant and before it was even established that a suspect was actually in the Hayden house is quite understandable (R. 69).

(2) In *Harris* an investigation had been made well before the entry and search, and the police had gone before a magistrate and obtained two warrants of arrest. As Justice Brennan stated in his dissenting opinion in *Abel* v. *United States*, 362 U.S. 217, 249 (1960):

> . . . The issuance of these warrants is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search.

See also *Di Bella* v. *United States*, 284 F.2d 897 (1960) (Dissenting opinion of Waterman, *J.* at 908). *But see*, Comment, 28 U. Chi. L. Rev. 664, 687, 688 (1961) (Discussing the distinction between the requisite probable cause for an arrest warrant and that required for a search warrant). In *Hayden* there was no prior preparation for the search and no warrants of any kind were issued before it. The search followed hard upon an emergency call. Haste and confusion were the order of the day and the limits of the search were left to the unfettered collective discretion of a half a dozen or more Baltimore policemen.

(3) Instead of a four room, one level apartment, which was the case in *Harris,* the search here covered an entire three story house. Here we have a "cellar" and a "garret" in reality as well as in rhetoric, and this expanded area adds to the total atmosphere of the search. It is most clearly relevant to the amount of control Hayden had over the area searched. To say that he had any control whatever over the basement of his nome while he was in custody upstairs in his bedroom dressed in a T-shirt and skivy shorts and surrounded by policemen is patently absurd.

B. *Harris* v. *United States, 331 U.S. 145 (1947), should be reconsidered now.*

It is commonplace to observe that one of the fundamental objectives of the Fourth Amendment is to eliminate exploratory searches. *Gouled* v. *United States,* 255 U.S. 298 (1921); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932). The so-called "mere evidence" rule at least in part represents an attempt to implement this objective. Comment, 27 La. L. Rev. 53, 68-9, 71-2 (1966). Comment, 20 U. Chi. L. Rev. 319, 327 (1953).

Yet it is perhaps better, as petitioner states in his brief at p. 11, that "if it is desired to limit exploratory searches this should be done by attacking the problem directly." Respondent entirely agrees with this statement, and offers both that the *Harris* case is the appropriate place at which to begin such an attack and that now is the appropriate time.

Unfortunately the precedent set by the *Harris* case has caused confusion. Indeed there has been a tendency on the part of lower state and federal courts to use *Harris* in an automatic, unthinking fashion to justify the worse

kinds of ransacking, exploratory searches. See *Gentry* v. *United States*, 268 F.2d 63 (4th Cir. 1959) (Search of garage upheld where arrest occurred in the house); *Leahy* v. *United States*, 272 F.2d 487 (9th Cir. 1959) (Search of entire house upheld where police had probable cause to believe instrumentalities might be concealed in any room of house); *Miller* v. *United States*, 354 F.2d 801 (8th Cir. 1966) (Over 8 police officers arrested defendant for abortion; searched entire house. Diaries seized admitted in conviction for income tax evasion); *People* v. *Brinn*, 32 Ill.2d 232, 204 N.E.2d 724 (1965), *cert. denied; sub nom.*, *Clements* v. *Illinois*, 382 U.S. 827 (1965) (Search warrants for eight homes held invalid; evidence seized admitted as incident to a lawful arrest); *People* v. *Boozer*, 12 Ill.2d 184, 145 N.E.2d 619 (1957) (Defendant arrested on front porch; search of entire house upheld); *People* v. *McGowan*, 415 Ill. 375, 114 N.E.2d 407 (1953) (Defendant arrested on stairs outside apartment; search of entire apartment upheld).

It is a small wonder in this context that the search warrant is becoming a rarity. In his book, *Search and Seizure and The Supreme Court* (Johns Hopkins Press, 1966), Jacob W. Landynski states at 116:

> That the Court's permissive attitude has indeed resulted in the framers' command being "set at naught" is evident from current practice. In this area, as in so many others, the state courts have followed the Supreme Court's lead. Abundant evidence exists that, at least on the state level, "the search warrant is a rarity." To give one example, in the thirty-year span between 1931 and 1962 the Los Angeles County Municipal Court issued exactly 538 search warrants. Yet during the

same period this court disposed of half a million felony cases.

Indeed the recent meticulous efforts of this Court to establish meaningful guidelines for the issuance of valid search and arrest warrants takes on increasing irony as the use of warrants by police diminishes. See, *e.g.*, *Jaban* v. *United States*, 381 U.S. 214 (1965); *United States* v. *Ventresca*, 380 U.S. 102 (1965); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Giordinello* v. *United States*, 357 U.S. 480 (1958). See also, *Stanford* v. *Texas*, 379 U.S. 476 (1965).

The unhappy facts are that it is all too easy for the police to manipulate an arrest to occur at a place they would like to explore. And in many cases the lower state and federal courts are sanctioning this technique. See *People* v. *Ghimenti*, 232 Cal. App.2d 76; 42 Cal. Rptr. 504 (1965) (Police informed defendant possession of firearms was outstanding. Two weeks later executed arrest warrant in defendant's home, searched for two hours and seized narcotics. Search and seizure upheld); *Collins* v. *Klinger*, 332 F.2d 54 (9th Cir. 1964), *cert. denied*, 379 U.S. 906 (1964) (Three month old arrest warrant used to arrest defendant in home and search entire two story house. Search and seizure upheld). *But see*, *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950) (Police repeatedly trailed "bagman" for numbers operation but did not arrest him until he entered his home. Incident to arrest the police searched the entire house. Held: Evidence seized inadmissible—arrest was a pretext for a search of the house).

Undoubtedly disturbed by the growing difficulties of the *Harris* doctrine, Justice Frankfurter, writing for the majority in *Abel* v. *United States*, 362 U.S. 217 (1960), ex-

pressed dismay and dissatisfaction with this Court's decisions concerning search incidental to legal arrests and culminating in *Harris*. At the conclusion of this review he invited the Court's reconsideration of the whole field when the point was raised in the proper case:

> We take as a starting point the cases in this Court dealing with the extent of the search which may properly be made without a warrant following a lawful arrest for crime. The several cases on this subject in this Court cannot be satisfactorily reconciled. This problem has, as is well-known, provoked strong and fluctuating differences of view on the Court. This is not the occasion to attempt to reconcile all the decisions, or to re-examine them. Compare *Marron* v. *United States*, 275 U.S. 192, with *Go-Bart Co.* v. *United States*, 282 U.S. 344, and *United States* v. *Lefkowitz*, 285 U.S. 452; compare *Go-Bart*, *supra*, and *Lefkowitz*, *supra*, with *Harris* v. *United States*, 331 U.S. 145, and *United States* v. *Rabinowitz*, 339 U.S. 56; compare also *Harris*, *supra*, with *Trupiano* v. *United States*, 334 U.S. 699, and *Trupiano* with *Rabinowitz*, *supra* (overruling *Trupiano*). Of these cases, *Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests. In view of their judicial context, the trial judge and the Government justifiably relied upon these cases for guidance at the trial; and the petitioner himself accepted the *Harris* case on the motion to suppress, nor does he ask this Court to reconsider *Harris* and *Rabinowitz*. It would, under these circumstances, be unjustifiable retrospective lawmaking for the Court in this case to reject the authority of these decisions. 362 U.S. 235, 236.

As additional proof of the fact that *Harris* has become little more than a rubber stamp of approval for the exploratory ransacking of private homes, one need look no further than the use of *Harris* in this very case. In spite of the differences set out above between this case and *Harris*, the Circuit Court dismissed the matter summarily, saying at p. 137 of the Record:

> In its extent the search did not exceed the broad limits tolerated in *Harris* v. *United States*, 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

The District Court took an equally cursory approach to the problem (R. 44).

Indeed petitioner at p. 11 of his brief expands the sweep of *Harris* even further:

> . . . Exploratory searches incident to a lawful arrest are condoned, if items technically classified as means, fruits or contraband are discovered, even if they relate to another crime other than the one for which an accused is subject to arrest.[6]

[6] *Harris* v. *United States*, 331 U.S. 145, 91 L. Ed. 1399 (1947).

If *Harris* is to be so understood, it is no wonder that the Baltimore police look for everything they can find!

Without doubt the case now before the Court is the proper vehicle for review of the *Harris* doctrine. To permit the police, as they always do according to the testimony in

this case (R. 112), to roam at will throughout the house, looking "everywhere" for "whatever we would find" (R. 112), amounts to no more than a license to explore. It is therefore apparent that if the search of the respondent's house by the Baltimore police is upheld by this Court under the authority of *Harris*, these cases will stand for the unqualified proposition that the Fourth Amendment permits the police, after arresting a man in his home, to rummage at will throughout the *entire* house, from "cellar to garret," in every nook and cranny, in search of *whatever* can be found which will convict him of *any* crime.

This broad authority which would look neither to the physical limits of the area searched, to the intensity of the search, nor to the intent of the officer in making the search is indeed the ultimate distortion, or more properly put, the complete destruction, of the original concept that searches without warrants should be narrowly confined to exceptional circumstances. *Weeks* v. *United States*, 232 U.S. 383 (1914); *Agnello* v. *United States*, 269 U.S. 20 (1925); *Marron* v. *United States*, 275 U.S. 192 (1927).

Before discussing the "mere evidence" rule, counsel for respondent would like to point out that, since the best rationale for the Rule has always been to limit exploratory searches, should this Court set realistic controls on exploratory searches by dealing with *Harris* directly, then the significance of its consideration of the mere evidence rule will decrease greatly. However, should this Court approve the search made here in the name of *Harris* then the last protection against the general search for evidence is the "mere evidence" rule.

## II.

**This Court Should Not Permit the Seizure of Items of Evidential Value Only Unearthed During the Course of an Intensive Exploratory Search.**

*The Rule and Its Origin*—Numerous opinions emanating from this Court have clearly established the principle that items of evidential value only are by their very nature not subject to seizure. *Boyd* v. *United States,* 116 U.S. 616 (1886); *Gouled* v. *United States,* 255 U.S. 298 (1921); *Marron* v. *United States,* 275 U.S. 192 (1927); *Go-Bart Importing Co.* v. *United States,* 282 U.S. 344 (1931); *United States* v. *Lefkowitz,* 285 U.S. 452 (1932); *Davis* v. *United States,* 328 U.S. 582 (1946); *Zap* v. *United States,* 328 U.S. 624 (1946); *Harris* v. *United States,* 331 U.S. 145 (1947); *On Lee* v. *United States,* 343 U.S. 747 (1952). See also article entitled *The Federal Search and Seizure Exclusionary Rule, Its Origin, Development, Present Status and Trend,* 45 Journal of Criminal Law, Criminology and Police Science, 51 (1954). A reading of these cases leaves no doubt whatever that the mere evidence rule is based on constitutional grounds. Petitioner's use of the original version of the Fourth Amendment and the Espionage Act of 1917, 40 Stat. 228, the forerunner to Fed. R. Crim. P. 41(b), to show that the Rule is of less than constitutional dimensions is not persuasive.

It is true that the first draft of the Fourth Amendment contained but one clause which dealt with search warrants. But the Amendment, as finally enacted has two clauses, the second deals with search warrants and the first protects the people against searches and seizures which are un-

reasonable in themselves. The importance of there being two clauses, which petitioner apparently has not realized, is clearly set forth in Lasson, *The History and Development of the Fourth Amendment* (1937) at 103.

> [T]he reason behind the present phraseology is still important. As reported by the Committee of Eleven . . . the Amendment was a one-barreled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is shown by his argument that although the clause was good as far as it went, *it was not sufficient,* and by the change which he advocated to obviate this objection. The provision as he proposed it [and as it now is] contained two clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches and seizures" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment. [Emphasis in the original, footnotes omitted.]

See also *Lopez* v. *United States,* 373 U.S. 427, 454-55 (1963) (Brennan dissenting); Landynski, *Search and Seizure and the Supreme Court* (Johns Hopkins Press, 1966).

With regard to the origin of the Espionage Act of 1917, the following explanation is offered by Osmond K. Fraenkel at 34 Harv. L. Rev. 361, 380 (1921):

> Before the enactment of this law the use of search warrants had been limited to revenue, counterfeiting and a few other classes of cases. The Act provides that search warrants may be issued under one of three contingencies: (§1) "when the property was stolen or embezzled"; (§2) "when the property was used as the means of committing a felony"; (§3) "when the property, or any paper, is possessed, controlled or used in violation of" federal penal statute.
>
> It is significant that Congress did not authorize a search for evidence, and in view of the circumstances under which the act was passed, it is safe to assume that Congress did not believe that it had constitutional power to do so. It is also worthy of note that this act is in effect a reproduction of the provisions long existing in the State of New York, which had been declared an embodiment of the historical doctrine.

For further evidence that Congress considered the Act to be all that was permitted by the Constitution, see 55 Cong. Rec. 1838-39 (1917) and H. R. Rep. No. 65, 65th Cong., 1st Sess. 20 (1917).

Since "the standard of reasonableness is the same under the 4th and 14th Amendments", *Ker* v. *California*, 374 U.S. 23, 33 (1963) (statement approved by eight Justices), the Rule is therefore clearly applicable to the states. *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

Furthermore, from reading the old English case of *Entick* v. *Carrington*, 19 Howell's State Trials 1029 (1765),

it is apparent that searches for items of evidential value only were not allowed at English common law. In that case the court was required to examine the common law to see if it permitted a general exploratory search and seizure of Entick's papers in the absence of a specific enabling act passed by Parliament. Such an Act had long been in effect but had expired shortly before the Entick search. The government in attempting to show that the common law permitted such a search, said that it was analogous to a search for stolen goods, which was allowed. The Court rejected the analogy. Certainly, if there had been a common law right to search for evidence at the time, the government would have used it as an analogy for obvious reasons.[3]

*The Policy Basis*

There are several rationales which are offered as justification for the Rule. The first of these is the protection it gives against self-incrimination. There can be no question that the Fifth Amendment has played a measurable role in the development of the Rule. *Boyd* v. *United States*, 116 U.S. 616 (1886), is the first case in which this court dealt with the mere evidence rule. The case involved the is-

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[3] The Solicitor General suggests in his brief that there apparently was no means of procuring the return of property seized by government officials at the time of *Entick* v. *Carrington*. According to Blackstone's *Commentaries*, however, at least two methods appear to have been available.

> The common law methods of obtaining possession or restitution from the crown, of either real or personal property, are, 1. By petition *de droit*, or petition of right . . . 2. By *monstrans de droit*, manifestation or plea of right: both of which may be preferred or prosecuted either in the chancery or exchequer . . . and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. Blackstone, III *Commentaries* 255-56 (16th ed., London, 1825).

suance of a *subpoena duces tecum* for private papers. In holding the papers inadmissible this Court stated that here "the Fourth and Fifth Amendments run almost into each other". 116 U.S. at 630.

Since we are confronted in this case with the seizure of articles of clothing, this Court's recent opinion in *Schmerber* v. *United States,* 384 U.S. 757 (1966), is highly relevant in considering the degree of Fifth Amendment protection afforded respondent. Although we agree with Justice Black that the words "testimonial or communicative" are not models of clarity and that their use in determining Fifth Amendment application is fraught with danger, we must reluctantly concede that if a person's blood is not within the protection of the Fifth Amendment, his clothing probably is not either. We hasten to add that we vigorously contest the petitioner's attempt to extend *Schmerber* to remove respondent's Fourth Amendment protection in this case and we will discuss this contention later in the brief.

Although respondent does not consider this rationale nearly so important as privacy considerations, to be discussed next, property concepts have been suggested as a basis of the mere evidence rule. See Note, 54 Geo. L. Rev. 593, 622 (1966). Property does perform the important function of maintaining the independence and dignity of the individual in modern society by drawing a line between public and private power. See Reich, *The New Property,* 73 Yale L. J. 733, 771 (1964). We ask only that if a man's property is neither a crime to possess nor designed for committing crime that he be allowed to keep it and that his home be secure from entry for the purpose of seizing it. It is in the public interest that a man's feelings and individual sovereignty be recognized to this extent.

A third policy basis behind the Rule, and the one which is by far the most important, has been summarized very well by Judge Learned Hand in *United States* v. *Poller*, 43 F.2d 911, 914 (2d Cir. 1930):

> [I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself* * * *. (Emphasis added.)

The Court should note carefully that this concept is strictly Fourth Amendment in orientation. It is designed to protect against searches for any and all kinds of evidence by the police. This Fourth Amendment policy is particularly cogent with regard to searches conducted incidental to a legal arrest, since the requirements of probable cause and particularity for obtaining a search warrant afford much of the necessary protection from indiscriminate searches for evidence. It is hardly surprising that most of the cases before this Court involving the mere evidence rule have also involved exploratory searches. See e.g. *United States* v. *Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344 (1931); see Solicitor General's Brief p. 36. Therefore, because the facts of this case deal with a search incidental to an arrest, this analysis will proceed from that point.

*Schmerber* v. *United States*, 384 U.S. 757 (1966), does *not* foreclose the application of the Fourth Amendment in the present context. This Court in its discussion there set up three categories of searches: (1) from the home, (2) from the person after a legal arrest, and (3) by intrusion into the human body.

Regarding the third category the Court noted it was writing on a "clean slate". 384 U.S. at 768. In discussing the petitioner's Fourth Amendment claim the Court stated:

> Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant[10] . . . are not instructive in this context 384 U.S. at 767-768. [Emphasis added.]

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[10] See, *e.g.*, *Gouled* v. *United States*, 255 U.S. 298. . . .

Petitioner's attempt to overcome the Court's statement in this regard by converting human blood into saleable property is not effective, and it is clear that the Court's *Fourth Amendment holding* in *Schmerber* simply is not applicable to this case.

Although petitioner continues to lump searches of a home with searches of the person after legal arrest, *Schmerber* clearly points out the important distinction between the two. The opinion recognizes that as early as *Weeks* v. *United States*, 232 U.S. 383 (1914), police officers were permitted to seize fruits *or evidences* of crime from the person after a legal arrest. *Schmerber* v. *United States*, 384 U.S. 757, 769. The reason for this permissive approach is that

danger to the arresting officer and danger of destruction of evidence under the direct control of the accused justifies a complete search of the accused's person. *This search must necessarily be exploratory in nature.* Once such a search of an arrested person is permitted, it becomes impractical and unnecessary to the enforcement of the Fourth Amendment's purpose to attempt to confine the search. His personal privacy has been completely invaded by the arrest and necessarily exploratory search of his person. But this does not mean that his entire home necessarily be subjected to the same indignity. The distinction is effectively set out by Judge Learned Hand in *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (1926):

> Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent. The second is a practice which English-speaking peoples have thought intolerable for over a century and a half. It was against general warrants of search, whose origin was, or was thought to be, derived from Star Chamber, and which had been a powerful weapon for suppressing political agitation, that the decisions were directed, of which Entick v. Carrington, 19 How. St. Trials, 1029, is most often cited. These cases were decided just after the colonists had been hotly aroused by the attempt to enforce customs duties by writs of assistance, and when within 30 years they framed the Fourth Amendment it was general warrants that they especially had in mind. Boyd v. United States, 116 U.S. 616 . . . .

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

See also *People* v. *Chiagles*, 237 N.Y. 193, 142 N.E. 583 (1923); *Harris* v. *United States*, *supra*, 164.

Probably recognizing the weakness of his argument that *Schmerber* has removed Fourth Amendment support from the Rule and it applies to searches of premises, petitioner contends in the alternative that the Rule was never meant to apply to non-documentary evidence but only to documentary evidence. (Petitioner's Brief pp. 20-23.) Attempting to counter the opinion of the court below which stated that there was "no rational distinction between private papers that are of only evidential value and articles of clothing of the same character" (R. 142) for purposes of applying the Rule, the petitioner contends that there *is* a "rational dis-

tinction" between such types of evidence which permits the *seizure* of one but not the other. This distinction is said to rest on the *Fourth Amendment,* the reasoning being that a search for inculpatory private papers will inevitably result in an exploratory search (Petitioner's Brief p. 20 citing *State* v. *Bisaccia,* 45 N.J. 504, 213 A.2d 185, 191-192 (1965). Having purported to remove Fourth Amendment support, the petitioner then leaves the Rule, as it applies to non-documentary evidence, now standing one-legged upon the *Fifth Amendment.* This prop he neatly kicks away with a cite to *Schmerber* (Petitioner's Brief pp. 21, 22).

The respondent fails to see how a search for papers is any more conducive to an exploratory search than is a search for non-documentary objects small in size which could be effectively concealed anywhere in a man's home. As a justification for limiting the Rule to documentary evidence the petitioner's thesis is simply illogical. A key or other small item of non-documentary evidence could easily be secreted in a desk drawer filled with private documents or for that matter between the pages of a book or diary.

Not only would such a limitation of the Rule on the above ground be illogical but it would totally fail to take account of the plain language of the *Fourth Amendment* which guarantees that "the right of the people to be secure in their persons, houses, *papers and effects* against unreasonable searches and seizures shall not be violated."

The petitioner also fails to explain how, if such a "rational distinction" exists, the Fourth Amendment permits the seizure of documentary as well as non-documentary evidence from the person of the accused following his law-

ful arrest, i.e. the telegram seized from Hayden's person after his arrest (R. 110).

Furthermore, there is no question but that documentary evidence is properly seizable under the Fourth Amendment if it falls into one of the acceptable categories: (1) possession of item seized a continuing crime. *Harris* v. *United States,* 331 U.S. 145 (1947) (false selective service cards); *United States* v. *Rabinowitz,* 339 U.S. 56 (1950) (573 forged and altered United States stamps). (2) Item being used as a means of committing a felony. *Marron* v. *United States,* 275 U.S. 192 (1927) (ledger book in illegal saloon part of outfit actually used to commit offense); *Zap* v. *United States,* 328 U.S. 624 (1946) ($4,000.00 expense check presented to Government in claim for reimbursement under cost plus fixed fee contract, when expense actually incurred had been only $2,500.00). (3) Item a "public" document subject to inspection by public authorities. *Davis* v. *United States,* 328 U.S. 582 (1946) (gasoline ration coupons); *Harris* v. *United States, supra* (selective service cards).

As this court stated in *Gouled* v. *United States,* 255 U.S. 298, 309 (1921), the very case credited with having first articulated the mere evidence rule:

> There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant.

We have therefore shown that the mere evidence rule is grounded in Fourth Amendment considerations and does have a functional role to play in limiting searches of a

home incidental to a legal arrest. The function may properly be examined by this Court in its cumulative effect on searches and seizures. *Linkletter* v. *Walker*, 381 U.S. 61 (1965). And the fact that the Rule might effect a particular search only negligibly should not be of great concern to the court. The long term effect of the Rule will be to prevent exploratory searches of homes for evidences of crimes. It will force the police to *think* of what they're searching for before they start to search.

Petitioner cites *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and also the Court to encourage "scientific investigation" (Pet. Brief pp. 38-39). If the ransacking of a man's home for all the evidence you can find against him is scientific investigation, it sounds like a poor alternative to the coerced confession!

*Plausible Modifications of the Rule*

Counsel for respondent is, of course, aware of the clamor which has arisen recently in connection with the mere evidence rule. *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P.2d 108 (1966), *cert. den.* 384 U.S. 908 (1966); *State* v. *Bisaccia*, 45 N.J. 504, 213 A.2d 185 (1965). Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 Colum. L. Rev. 355 (1966); Comment, 4 Duquesne L. Rev. 582 (1965); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361 (1921); Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L.J. 593 (1966); Kamisar, *Public Safety v. Individual Liberties: Some "Facts and Theories"*, 53 J. Crim. L., C. & P. S. 171 (1962); Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 Calif. L. Rev. 474 (1961); Comment, 27 La. L. Rev. 53 (Dec., 1966); Manwaring, *California and the Fourth Amendment*,

16 Stan. L. Rev. 318, 327-28 (1964); Nedrud, *The Criminal Law 1967*, Sample Section (Oct., 1966); Comment, 54 Nw. U. L. Rev. 611 (1964); Comment, *Search and Seizure of "Mere Evidence"—Amendment to Ore. Rev. Stat. Sec. 141.010—Effect on Prior Law and Constitutionality*, 43 Ore. L. Rev. 333 (1964); Reynard, *Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right?*, 25 Ind. L.J. 259 (1950); Note, 2 San Diego L. Rev. 101 (1965); Shellow, *The Continuing Vitality of the* Gouled *Rule: The Search For and Seizure of Evidence*, 48 Marq. L. Rev. 172 (1964); Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U.C.L.A. L. Rev. 857 (1966); Comment, *Limitations on the Seizure of "Mere Evidentiary Objects"—A Rule in Search of a Reason*, 20 U. Chi. L. Rev. 319 (1953).

As petitioner points out (Pet. Brief pp. 44-49) the area that has caused much of the difficulty and confusion in the application of the Rule has been in the definition of an instrumentality. In their eagerness to avoid the Rule, prosecuting authorities have strained and distorted the concept of a criminal instrumentality to squeeze evidentiary items into a seizable category. See, *e.g.*, *Morrison* v. *United States*, 262 F.2d 449 (D.C. Cir. 1958). See also, Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L. Rev. 593, 609-610 (1966). In a few cases the courts have employed these strained concepts in their opinions. See for example, *United States* v. *Guido*, 251 F.2d 1 (7th Cir. 1958), *cert. denied*, 356 U.S. 950 (1958). Respondent contends most earnestly that this confusion would be substantially compounded if this Court should hold that ordinary clothing is to be classified as an instrumentality of crime. Indeed petitioner puts forward as a reason for abandoning

the Rule the fact that some courts are "technically" considering clothing as instrumentalities of crime, while others are not, thereby causing confusion. Respondent contends that this confusion can be dealt with much more directly by this Court making the common sense decision that ordinary clothing used in an ordinary way simply is not to be considered an instrumentality of crime.[4]

However, respondent recognizes that criticism of the Rule is not limited to confusion caused by misapplication of the instrumentality exception. It may be, therefore, that the Court will wish to modify the Rule to preserve its functional role in protecting Fourth Amendment rights while shearing away some of its less defensible technicalities. It is for this reason that respondent includes the following discussion in his brief.

*Searches conducted under the authority of a valid search warrant specifically describing the items of evidential value only to be seized*—This is the major concern of the Solicitor General of the United States is his *amicus curiae* brief. As he points out, in certain circumstances Fifth Amend-

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[4] At this point a comment concerning the cases cited at pp. 37-38 of the Solicitor General's is required. Although these cases are included in a section dealing ostensibly with the instrumentality exception, only one of the eight cases cited, *United States* v. *Guido*, 251 F.2d 1 (7th Cir. 1958) deals with that topic. The others are simply not in point:

*Margeson* v. *United States*, 361 F.2d 327 (1st Cir. 1966), *cert. den.*, 385 U.S. 830; *United States* v. *Caruso*, 358 F.2d 184 (2d Cir. 1966), *cert. den.*, 385 U.S. 862; *Whalem* v. *United States*, 346 F.2d 812 (D.C. Cir. 1965), *cert. den.*, 382 U.S. 862; *Robinson* v. *United States*, 283 F.2d 508 (D.C. Cir. 1960), *cert. den.*, 364 U.S. 919; and *Charles* v. *United States*, 278 F.2d 386 (9th Cir. 1960), *cert. den.*, 364 U.S. 831; all deal with *seizures from the person after a legal arrest*. And in *Morton* v. *United States*, 147 F.2d 28 (D.C. Cir. 1945), *cert. den.*, 324 U.S. 875 counsel for the defendant waived the point.

ment problems may be raised. However, assuming they are not, should the Court wish to modify the Rule, this would certainly be the place to start. For the search warrant would afford the necessary protection against unfettered police discretion to rummage at will for evidence. Of course, the facts of the present case are far removed from this hypothetical situation, such a modification would have no bearing on respondent's position.

The strong policy reasons for not modifying the Rule further are so well set out in a recent article in 27 La. Law Rev. 53, 69-72 (1966) that they are quoted here.

> *Searches Under Warrant Not Specifying the Mere Evidence Seized*—When the entry is under a lawful search warrant, but the mere evidence seized is not specified in that warrant, two theories support finding the seizure illegal. One can hold the seizure invalid on the ground that the specificity clause of the fourth amendment prohibits any "seizure of one thing under a warrant describing another." This seems to be the position taken by the Supreme Court in *Marron* v. *United States*.[90] If that approach is taken, there is, of course, no need for the mere evidence rule. However, another Supreme Court case[91] has been read to mean that an officer who enters under a lawful search warrant may seize other things that he happens upon in the normal course of his search.[92] Recently the Supreme Court ex-

[90] 275 U.S. 192 (1927).

[91] *Steele* v. *United States*, 267 U.S. 498 (1925).

[92] In *Steele* a warrant was issued authorizing the seizure of whisky, and other intoxicating liquors were seized, and the Court upheld the seizure. Judge Learned Hand, in *United States* v. *Kirschenblatt* interpreted *Steele* to mean that "officers, once in under a search warrant, are not confined to the contraband specified in it." 16 F.2d 202, 203 (1926).

pressly reserved decision on the question whether contraband may be seized in the course of a search under a warrant not specifying it.[93] Several appellate courts have held that there are circumstances in which things not specified in the warrant may be seized.[94] One of these cases quoted the statement of the mere evidence rule in *Harris* v. *United States* as controlling.[95]

If seizure of something not specified in the search warrant is allowed, the fourth amendment and *Gouled* should limit the kinds of things seizable. *Gouled* itself applied the mere evidence rule in those circumstances. Some limitation is necessary to prevent a special search from changing into a general one; not applying the *Gouled* rule would greatly weaken the specificity requirement.

*Warrantless Searches*—Policy underlying the fourth amendment requires that the *Gouled* rule bar the seizure of all mere evidence where the search is incidental to an arrest, or otherwise without a search warrant, unless the mere evidence is found on the arrestee's person. The specificity requirement of the fourth amendment cannot protect the individual's privacy from intrusion by the police where there is no warrant to contain the specification. Searches without a warrant should not give the police any greater power than searches with a warrant. Without the mere evidence rule to substitute for the specificity requirement, the

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[93] *Stanford* v. *Texas*, 379 U.S. 476, 486 (1965).

[94] *Porter* v. *United States*, 335 F.2d 620 (9th Cir. 1964); *United States* v. *Eisner*, 297 F.2d 595 (6th Cir. 1962).

[95] *United Sates* v. *Eisner*, 297 F.2d 595, 597 (6th Cir. 1962).

police would have greater power to search and seize without a warrant than with one.[96]

If the seizure of mere evidence in a warrantless search were allowed, police officers would be encouraged to bypass the procedural difficulties of obtaining a search warrant by arresting the accused on the premises which they wish to search. Application to such searches of the rule barring the seizure of all mere evidence would encourage the police to obtain warrants. The individual's privacy would be better protected if the practice of obtaining search warrants was thus encouraged.

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[96] In *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932), the Court stated: "[T]he authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained."

## III.

**Failure by Trial Counsel to Object in This Case to the Admission Into Evidence of the Items Seized During the Search of the Respondent's Home Did Not Forfeit His Right to Assert His Constitutional Claims Before This Court.**

In order to preclude consideration of the respondent's constitutional claims on federal habeas corpus in the court below the petitioner must have shown that Hayden, acting through his attorney, deliberately and knowingly bypassed state court procedure in failing to object *and* that the failure to object constituted an independent and adequate state ground. *Henry* v. *Mississippi*, 379 U.S. 443,

452 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963). This the petitioner failed to do.

A. *Failure to object to the admission into evidence of items seized in the search of the respondent's home did not constitute a deliberate by-pass of state court procedure.*

In *Henry* v. *Mississippi, supra,* there had been a failure by trial counsel to make contemporaneous objection to the admission of certain evidence. On direct appeal this Court remanded the case for a hearing on the question of whether the failure to object was a conscious, strategic or tactical maneuver on the part of trial counsel which would constitute a deliberate by-pass of state court procedure, or whether the failure to make contemporaneous objection resulted merely from oversight or ignorance on the part of trial counsel. In remanding the Court stated at 452:

> We think [this] course is particularly desirable here, since a dismissal on the basis of an adequate State ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which *the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately by-passed the orderly procedure of the state courts. Fay* v. *Noia, supra,* 372 U.S. at 438, 83 St. Ct. at 848 (emphasis added).

The record in this case presents uncontradicted testimony as to the reasons for trial counsel's failure to object to the admission into evidence of the articles seized in the search of the respondent's home. In the habeas corpus hearing in the United States District Court for the District of Mary-

land, Mr. Freedman, respondent's trial counsel testified as follows:

> Q. . . . I would like to know in your opinion, sir, why no objection was made to the admissibility of the matters seized at Mr. Hayden's home when they were sought to be introduced by the State at the time of the trial?
>
> A. (By trial counsel) I think I can answer that. The reason for that was that Mr. Hayden's defense solely was that of mistaken identity; he was the wrong man, and in my opinion it was a sufficient case of good and probable cause for the arrest and the search and seizure, and from the standpoint of its legality I felt that the arrest and search and seizure were good and sufficient law.
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> * * * * *
>
> Q. Did you feel that everything that was seized in his home, Mr. Freedman, would necessarily become admissible at the trial of this case?
>
> A. It could or could not be depending upon the Court's ruling, how the Court felt about it.
>
> Q. Why did you not enter an objection to it?
>
> A. I didn't enter an objection because I thought it was properly, it was proper evidence to be admitted (R. 89, 90).

Petitioner's contention that trial counsel's failure to object was prompted by "two strategic reasons" (Petitioner's Brief pp. 60-62) simply lacks any support in the record or in logic. This contention is based entirely on conjecture and well deserves the summary treatment accorded it by the court below. (See R. 134). The *sole* reason for

trial counsel's failure to object to the admission into evidence of these articles was his ignorance as to the law governing their admissibility (R. 89, 90). In this area of the law, hardly noted for its clarity or certitude, such an error by trial counsel cannot be considered a deliberate by-pass of state court procedure as set out in *Henry* v. *Mississippi, supra* and *Fay* v. *Noia, supra.*

B. *By ignoring the failure to object and proceeding to a determination of the merits of respondent's federal question, the Court of Appeals of Maryland has declined to invoke an independent state ground.*

The court below found it unnecessary to consider whether the respondent had deliberately by-passed state court procedure since the Court of Appeals of Maryland ignored the failure to object and remanded the case to the lower state court for a determination of the legality of the search and seizure (R. 135).

> When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant (R. 135).

Petitioner is of the view, however, that: (1) The Court of Appeals of Maryland did not decline to invoke an inde-

pendent state ground, it merely failed to do so due to its lack of knowledge as to whether an objection to admissibility was made at trial. (2) It is the duty of a federal court to impose a forfeiture of a federal claim (thereby vindicating a legitimate state interest) when the state has chosen not to protect such an interest.

As to the first view, petitioner asserts that since the Court of Appeals of Maryland did not have the transcript of Hayden's trial it did not know whether or not objection had been raised at trial. Consequently, it remanded so that "*a Townsend* v. *Sain* type hearing be held to determine factually whether or not the contemporaneous objection rule was applicable." (Petitioner's Brief p. 57). This view is not only illogical but squarely contradicts the plain language of the Court of Appeals of Maryland in its Mandate remanding the case to the post conviction judge.

> Instead of ascertaining whether in fact there had been an illegal search and seizure . . . the hearing judge summarily disposed of the matter by stating that *the question should have been raised at the trial and was not a ground for post conviction relief.* (Emphasis added.) *Hayden* v. *Warden of the Maryland Penitentiary,* 233 Md. 613, 614, 195 A.2d 692 (1963).

There can be no question that prior to its remand for a determination of the merits of the respondent's federal claim the Court of Appeals *knew* that no objection had been raised at trial, yet chose to ignore this procedural defect. There can be no question that it remanded for a determination of the merits of respondent's constitutional claim that he was a victim of an illegal search and seizure. This, in fact, was the reading of the Mandate by the post conviction judge (R. 26).

As to the second view, under the holding of *Fay* v. *Noia*, 372 U.S. 391 (1963), a federal court does not have discretion to impose a forfeiture of a federal claim on the basis of a failure to follow state procedure unless the state has refused to consider the federal claim.

> We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.* (Emphasis added.) 372 U.S. at 438.
>
> If a habeas applicant . . . forewent the privilege of seeking to vindicate his federal claims in the state courts [for] . . . any . . . reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief *if the state courts refused to entertain his federal claim on the merits.* . . . (Emphasis added.) 372 U.S. at 439.

In this case the Court of Appeals of Maryland ordered that respondent's federal claim be determined on the merits by the state post conviction judge (R. 26).

While it is clear that a state court's finding of waiver of a federal claim will not bar a federal court from redetermining the question, it is equally clear that a federal court cannot impose a forfeiture of a federal claim (thereby protecting a legitimate state interest) when the state by its conduct in the case has chosen not to protect this interest. If the Court of Appeals of Maryland chose not to insist upon adherence Maryland's contemporaneous objection rule (Md. Rules 522d2, 885) as a prerequisite to a state court determination of the respondent's federal claim, which it

did, then a federal court simply has no justification for insisting on it as a prerequisite to its hearing the claim.

The Ninth Circuit has held differently. In *Nelson* v. *California*, 346 F.2d 73, 82 (9th Cir. 1965), the court held that a state's willingness to pass upon a federal claim does not prevent a federal court from finding a deliberate by-pass, since ". . . the deliberate by-passing or waiver rule is not procedural; it is based upon a conscious choice, by the petitioner's counsel, when confronted with a procedural rule, rather than upon the rule itself." Judge Skelly Wright commented on the Ninth Circuit's holding as follows:

> The court's position is that, since the waiver standard is federal, the state's decision does not bind federal courts whether that decision imposes or fails to impose a waiver. Logically, this reasoning is unassailable. And it may well be true that, where the habeas applicant actually waived some federal right under the *Johnson* v. *Zerbst* formula, federal courts should insist upon the waiver although the state court does not. But the deliberate bypass rule allows district courts to impose waivers of federal rights by inference from procedural defaults only in order to vindicate substantial interests preserved by state procedural rules imposing forfeitures of remedies. It makes no sense in light of this purpose to insist upon the imposition of a forfeiture because of noncompliance with a state rule when the state itself demonstrates that strict compliance with the rule involved is not necessary, at least in the particular case, to vindicate the interests the rule is designed to serve. A state's judgment that "a

suitor's conduct in relation" to some state procedure should not "disentitle him to the relief he seeks,"[235] should be final.

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[235] *Fay* v. *Noia*, 372 U.S. 391, 438 (1963). In fact, *Noia* holds that the district courts have discretion to "deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts *and in so doing has forfeited his state court remedies.*" *Ibid.* (Emphasis added.)

Wright & Sofaer, *Federal Habeas Corpus for State Prisoners*, 75 Yale L.J. 895, 962 (1966).

The position of Judge Wright and of the court below finds explicit support in the holding of *Fay* v. *Noia* and is eminently reasonable in the context of habeas corpus where every reasonable presumption against a waiver of fundamental constitutional rights should be indulged.

## Conclusion

For all the reasons stated above, the respondent respectfully submits that the search of his home was illegal, the seizure of evidentiary items improper, and their admission into evidence a violation of his constitutional rights. For these reasons the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

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